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No. 93-518

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In The  
**Supreme Court of the United States**  
October Term, 1993

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FLORENCE DOLAN,

*Petitioner,*

v.

CITY OF TIGARD,

*Respondent.*

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On Writ Of Certiorari  
To The Oregon Supreme Court

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BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED FOR REVIEW

1. Where the Dolans applied to expand their small plumbing and electrical supply store in downtown Tigard, Oregon, and that expansion neither received any special municipal benefits nor created any specific, quantifiable, demonstrable burdens on municipal recreational, transportation, or storm water drainage services, was the city justified in imposing on the Dolans conditions of approval of their store expansion requiring them to dedicate to the city ten percent of their land for a greenway, an expanded future storm water drainage channel, and a pedestrian and bicycle pathway?

2. Where the Dolans asserted to the city that its dedications were a taking because those dedications failed to substantially advance a legitimate state interest, was the city required to find the terms of the dedications were reasonably proportional in both character and degree to the direct, quantifiable burdens on municipal services created by the Dolans' proposed store expansion?

3. Where the city's permit dedications were challenged as a taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution, did the Oregon Supreme Court err in failing to apply heightened scrutiny to the Dolans' claims that the city's factual findings were not legally sufficient, under this Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), to justify its imposed dedications?

## PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding. In the proceedings before the Oregon Supreme Court below, John Dolan, husband of Petitioner Florence Dolan, was also a Petitioner, together with Florence Dolan. Mr. Dolan is now deceased, and is survived by his widow, Florence Dolan.

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OPINIONS BELOW

The opinion of the Oregon Supreme Court (Pet. App. A, pp. A-1 through A-30) is reported at 317 Or. 110, 854 P.2d 437 (1993). The opinion of the Oregon Court of Appeals (Pet. App. C, pp. C-1 through C-10) is reported at 113 Or. App. 162, 832 P.2d 853 (1992). The opinions of the Oregon Land Use Board of Appeals (Pet. App. D, pp. D-1 through D-18, and Pet. App. E, pp. E-1 through E-24) are reported at 22 Or. LUBA 617 (1992) and 20 Or. LUBA 411 (1991) respectively. Resolution 91-66, the Final Order of the City of Tigard, dated September 17, 1991, incorporating by reference Final Order 91-09 PC of the City of



Tigard Planning Commission, dated July 15, 1991 (Pet. App. G, pp. G-1 through G-48) is not reported.

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### JURISDICTION

The judgment of the Oregon Supreme Court was entered on July 1, 1993, and appellate judgment was entered on July 28, 1993. The petition for a writ of certiorari was filed on September 29, 1993, and was granted on November 29, 1993. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1257(a).

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### CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The statutes at issue are Oregon Revised Statutes (ORS) 197.010 (1991) and 197.175 (1991) (Pet. App. H, pp. H-1 through H-3). The administrative rules at issue are Oregon Administrative Rule (OAR) 660-15-000(5), Open Spaces, Scenic and Historic Areas, and Natural Resources (1975) and OAR 660-15-000(12), Transportation. OAR 660-15-000(5) and OAR 660-15-000(12) are set out, in full, in Appendices A and B to this brief.

The ordinances at issue are the City of Tigard Comprehensive Plan, Volume 2, revised December, 1987 (plan), and Title 18 of the City of Tigard Community Development Code, revised February, 1989 (CDC). The relevant portions of the Comprehensive Plan are set out at Pet. App. J, pp. J-1 through J-2. The relevant portions of the CDC are set out at Pet. App. K, p. K-1 and at Appendix C to this brief.

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### STATEMENT OF THE CASE

Mrs. Dolan, an elderly widow, owns a 1.67 acre commercial lot on Main Street in the City of Tigard (city), on which there is an existing 9700 square foot building that she uses for the operation of a small retail electric and plumbing supply store. The lot is in the Commercial Business District (CBD) zone. Pet. App. G, p. G-3. With the exception of the land under the existing building, the 71,500 square foot lot is devoted to customer parking, part of it being paved, and most of the remainder being surfaced with gravel. Fanno Creek, a small stream, runs adjacent to the west side of the lot. Part of the property is within the creek's 100 year flood plain. Mrs. Dolan, and her late husband John, desiring to expand and modernize their business to meet commercial competition, applied to the city for approval to raze the existing old 9700 square foot building and to build a new, larger, 17,600 square foot, building, better suited to the needs of their business. Pet. App. D, p. D-3. The use for which they applied is a permitted use in the CBD zone. App. C-2. They also proposed to establish a paved parking area of 39 spaces.

Pet. App. G, p. G-30, encompassing 20,200 square feet, and covering 40 percent of the lot. J.A. at 3.

The city approved their application, subject to certain conditions. Among those conditions was the requirement that the Dolans dedicate to the city 7000 square feet of their 1.67 acre lot, which included all of the land within the creek's 100 year flood plain for a greenway, plus an additional 15 foot wide strip adjacent to the flood plain for a pedestrian and bicycle pathway. The city's conditions were imposed pursuant to the city's Comprehensive Plan and Community Development Code. That plan and code had been prepared and adopted pursuant to laws promulgated by the State of Oregon.

In 1973, the State of Oregon adopted a statute requiring cities and counties to adopt comprehensive land use plans in compliance with statewide land use goals developed by the state's Land Conservation and Development Commission (LCDC), an administrative agency created to direct and administer the state's land use regulatory system. Cities and counties were also required to adopt land use regulations to implement their comprehensive plans. Pet. App. H, p. H-2.

The LCDC, in 1975, developed statewide land use Goal 5 to conserve open space and protect natural and scenic resources. That goal required cities and counties, including the City of Tigard, to provide programs to protect, *inter alia*, "[l]and needed or desirable for open space." App. A-1. The goal defined open space to include "any land area that would, if preserved and continued in its present use," "protect streams," "enhance the value to the public of neighboring parks . . . or other open space,"

and "enhance recreation opportunities." App. A-2, 3. The goal's implementing measures encouraged cities and counties, in providing such programs, to use "fee acquisition, . . . preferential assessment, development rights acquisition and similar techniques . . . ." App. A-5.

In 1975, the LCDC also adopted statewide land use Goal 12 to provide and encourage a safe, convenient and economic transportation system. Cities and counties were required to prepare transportation plans that "consider all modes of transportation including . . . bicycle and pedestrian," and to "avoid principal reliance on any one mode of transportation." App. B-1. The goal also provided that "[t]ransportation systems, to the fullest extent possible, should be planned to utilize existing facilities and rights of way . . . ." App. B-2.

The city, pursuant to state law and the state land use goals, thereafter adopted a comprehensive land use plan, last revised in November, 1983. That plan included a finding that the city would develop policies to retain "a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control." Pet. App. J, p. J-1. The policy adopted by the city to implement that finding required, along Fanno Creek, "[t]he dedication of all undeveloped land within the 100-year floodplain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." Pet. App. J, pp. J-1, 2. The city described the land to be dedicated as "the backbone of the open space system." Pet. App. J, p. J-2. The plan made no provision for fee acquisition, preferential assessments, or acquisition of development rights as means for the city to acquire that land. Instead, the plan mandated that

those owning property along the creek were to be singled out when they sought approval of land use permits and required to dedicate that land.

Finally, the plan's transportation section established that "[t]he City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to . . . require the necessary easement or dedications for the pedestrian/bicycle pathways." Pet. App. J, p. J-2. The plan made no provision for the pedestrian and bicycle pathways along Fanno Creek to be established in existing rights of way, but again singled out those property owners along the creek to dedicate the necessary right of way when they sought approval of land use permits.

To implement these plan provisions, the city revised its zoning ordinance, Title 18 of its Community Development Code (C.D.C.), in February of 1989. That code, at Section 18.120.180.A.8, provided, for approval of site development plans for development in and adjacent to 100-year floodplains, that the city shall "require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." Pet. App. K, p. K-1. The city's code did not require either findings or evidence establishing any relationship between this dedication and development impacts.

When the Dolans applied for site development review, the city, pursuant to C.D.C. § 18.120.180.A.8, required the Dolans to dedicate to the city: (1) all of the portions of their lot lying within the 100-year flood plain,

for use by the city as a greenway; and (2) an additional 15 foot strip of property adjacent to and above the 100-year flood plain, for use for future reconstruction of a storm drainage channel and as a public pedestrian and bicycle pathway, and additionally to construct that pathway. Pet. App. G-28, 43. The total land required to be dedicated was approximately 7000 square feet, or about 10% of the total 1.67 acre parcel, of which 3600 square feet fell above the flood plain boundary. The Dolans argued these dedications were unconstitutional<sup>1</sup> and sought from the city a variance from them. In denying the variance, the city again rejected their constitutional arguments.

There was, however, neither any direct evidentiary linkage between the development of the Dolans' new store and the imposed dedications, nor any detailed studies demonstrating such adverse impacts on the city. The city's findings justified the greenway exaction by determining additional stormwater runoff, resulting not only from the Dolans' development, but also from "elsewhere within the Fanno Creek drainage basin, is expected to increase flow within the creek" and concluded the public needs the "ability to make channel modifications

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<sup>1</sup> The city's imposition of dedications during site development review was originally challenged in the Oregon Land Use Board of Appeals (LUBA), as violating the Federal Constitution. LUBA denied the appeal, holding the constitutional claim was not ripe because of failure to pursue a variance. Pet. App. E-1 - E-24. Petitioner, together with her late husband, John T. Dolan, then reapplied to the city, seeking a variance. When the City Council, on September 19, 1991, denied their variance application, the Dolans again appealed to LUBA, reasserting their Federal Constitutional claim. J.A. at 4.



in this area to offset the increase in stream flow." Pet. App. G, p. G-40. Even though the city concluded the new store was "similar to a 'general retail sales, bulky merchandise' use," Pet. App. G, p. G-32, the city's findings purported to justify the pedestrian and bicycle pathway dedications by determining they were "reasonably related to the applicant's request to intensify the development of this site," because it was "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs."<sup>2</sup> Pet. App. G, p. G-24.

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<sup>2</sup> The city also imposed on the Dolans three other conditions: First, a \$14,256.02 traffic impact fee "to ensure that [this] new development contributes to extra-capacity transportation improvements needed to accommodate additional traffic generated by such development." Pet. App. G, pp. G-14, 15. Even though the city later eliminated this fee as a specific condition of approval, the city made clear the Dolans would have to pay the fee during the course of their project:

"The Planning Commission's decision eliminates condition of approval #9 of the Director's designee's decision. That condition stated that a Traffic Impact Fee was required to be paid upon issuance of a building permit for the proposed building on the site. While the Commission does not find that this statement regarding the Traffic Impact Fee needs to be a condition of approval of the application, this action does not relieve the applicant of the responsibility of compliance with Washington County Ordinance 379 . . . [requiring payment of] the county-wide Traffic Impact Fee . . . ." *Id.* at G-47, 48.

Second, the city required the Dolans to calculate the actual increase in impervious surface on their lot that would contribute to increased storm water runoff, and to pay a "fee in-lieu of water quality" to mitigate the effects of that runoff. *Id.* at G-45, 46.

On review, the Oregon Supreme Court affirmed the decisions of LUBA and the Oregon Court of Appeals, which had rejected the Dolans' constitutional takings claim.<sup>3</sup> The Oregon Supreme Court stated that the city's site development review dedications were not a taking because the transportation impacts of, and the storm water runoffs from, the Dolans' new larger store, were reasonably related, respectively, to the requirements to dedicate land for a pedestrian and bicycle pathway, and a greenway. The court rejected the Dolans' contention the "cause and effect" relationship or "essential nexus" of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) required it to subject the city's decision to heightened scrutiny – and to find the city's decision unconstitutional unless the city's findings established a "substantial relationship" between the impacts of the development and the dedication requirements. Pet. App. A, p. A-13.

Justice Peterson dissented from the court's decision. In his view, the city failed to establish the necessary relationship between the impacts of the Dolans' use and the dedications imposed on them. He asserted he "would require [city] findings that *demonstrate* that the increased

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Third, the city required the Dolans to relocate the "footprint" of their building to the east "in order to accommodate the future City-initiated relocation of the floodplain bank [approximately five feet to the east]." *Id.* at G-13.

<sup>3</sup> The Dolans unsuccessfully argued at every level of appeal below that the reviewing court should apply heightened scrutiny and hold the city's findings are not legally sufficient to establish the requisite "essential nexus" between the impacts of the proposed development and the dedications imposed. Petitioner's Reply to Br. in Opp. at 4.

intensity of the use requires the exaction." Pet. App. A, p. A-25 (Peterson, J., dissenting) (emphasis in original).

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### SUMMARY OF ARGUMENT

This case squarely presents the question of when this Court's opinion in *Nollan* permits a local government to demand real property be dedicated to the public by the owner of a small business as a condition of the government allowing her to secure a building permit to expand her business to meet the competitive demands of commerce.

Petitioner, Mrs. Florence Dolan – owner of the A-Boy Plumbing supply store, located on property adjacent to Fanno Creek on Main Street in Tigard, Oregon – contends the city may not impose that dedication on her, without violating the Fifth and Fourteenth Amendments to the U.S. Constitution, unless there is evidence in the record that her expanded business's adverse impacts on municipal recreation, storm water disposal, and transportation services are directly, substantially, and proportionately linked in both character and degree to the dedications.

Disregarding Mrs. Dolan's argument that such findings were mandated by this Court's decision in *Nollan*, 483 U.S. at 834 n.3, 841 (1987), the city required her to dedicate to the city 7000 square feet of her commercial property as a condition of approval of her proposal to raze her existing store and replace it with a new, larger and more modern retail sales facility. The city contended, regardless of the reasons for Mrs. Dolan's proposal, it is always free to require the dedication of real property

along Fanno Creek as long as it will contribute to the implementation of the public policies reflected in the city's comprehensive land use plan. The city's contention places directly upon the shoulders of Mrs. Dolan, as a riparian land owner, the full cost of public benefits derived from enhancing public recreation, storm water disposal, and transportation services on her property. That result cannot be squared with the guarantees of the Fifth and Fourteenth Amendments as interpreted by this Court's decisions on the imposition of special assessments on property owners.

Mrs. Dolan is being subjected to the most severe form of deprivation of her property rights – formal expropriation of almost ten percent of her fee interest in her land. Her request to raze and rebuild her plumbing and electric supply store provides no justification for the city to require her to dedicate a portion of her property to the city for a greenway, expanded storm drain channel, and pedestrian and bicyclist pathway, and to construct that pathway. Her proposal was never quantified by the city as having any definite and specific increased adverse impacts on municipal services. The city assumed, theorized, and hypothesized her proposed use might have adverse impacts.

This Court has repeatedly noted that the underlying purpose of the Takings Clause is to ensure that some persons alone are not required to bear fully the cost of public benefits "which, in all fairness and justice should be borne by the public as a whole." See, e.g., *Nollan*, 483 U.S. at 835-836 n.4 (citation omitted). Under the facts of the instant case, where Mrs. Dolan's action has not been

shown, by evidence in the record, directly and specifically to have created the need for a public greenway, expanded storm drain channel, and pedestrian and bicyclist pathway, and Mrs. Dolan's property receives no special benefits from those public facilities, she is being unfairly and unjustly required to bear the full costs of providing those facilities for general public use.

The city's decision, relying on hypothesis and assumptions, violated this Court's holding in *Nollan* that there must be an "essential nexus" between project impacts and dedication conditions. Those conditions must be reasonably fashioned in both character and degree to address the adverse impacts that the reconstruction of Mrs. Dolan's store would impose on the public health, safety and welfare. Neither the strength of the public need for the greenway, expanded storm drainage channel, and pedestrian and bicyclist pathway, nor a showing of a reasonable, or rational relationship, between the dedication conditions and the legitimate interests sought to be achieved by the city, is sufficient to defeat Mrs. Dolan's takings claim. Because the character and degree of the burdens imposed by the permit conditions on Mrs. Dolan are wholly out of proportion to the adverse impacts of her new store on the public, the conditions are unconstitutional.

The Oregon Supreme Court, in upholding the constitutionality of the city's decision, and rejecting Mrs. Dolan's claim that the city's land use decision failed to substantially advance a legitimate state interest, did not apply the correct degree of judicial scrutiny to the city's purported "essential nexus." The Oregon Supreme Court, affirming the judgment of the Oregon Court of Appeals

and the Oregon Land Use Board of Appeals, held the city's dedications were not an unconstitutional taking because the federal constitutional takings/exactions standard of review does not require heightened scrutiny of the relationship between the adverse impacts of a proposed use and government-imposed dedications. The court concluded the dedications imposed by the city were reasonably related to the adverse impacts of the Dolans' new store.

The failure of the Oregon Supreme Court to make an appropriate legal analysis of the burdens being imposed on Mrs. Dolan by the city denied her any meaningful consideration of whether the dedication conditions constituted a taking in violation of the Fifth and Fourteenth Amendments. Petitioner respectfully urges this Court to reverse<sup>4</sup> the decision of the Oregon Supreme Court, and hold that the City of Tigard violated the Fifth and Fourteenth Amendments to the U.S. Constitution when it required dedication of 7000 square feet of Mrs. Dolan's private property as a condition of site development approval for her new plumbing and electrical supply store in downtown Tigard.

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<sup>4</sup> In Oregon, a decision by the Oregon Land Use Board of Appeals, or a court reviewing L.U.B.A.'s opinion, of a local land use decision, may reverse that local decision as being unconstitutional. See Br. in Opp. App. C-3. Where a land use decision is found unconstitutional, "[a]n owner who maintains that the government's acts entitle him to compensation may seek compensation in circuit court [Oregon's court of general jurisdiction]." *Dunn v. City of Redmond*, 303 Or. 201, 209, 735 P.2d 609 (1987). Thus, reversal of the subject decision by this Court would enable Mrs. Dolan to seek compensation for inverse condemnation in Oregon's circuit courts.



## ARGUMENT

## I

MRS. DOLAN HAS NEITHER RECEIVED ANY SPECIAL BENEFITS NOR CREATED ANY SPECIAL, QUANTIFIABLE PUBLIC BURDENS TO JUSTIFY THE IMPOSITION ON HER OF THE FULL COST OF PROVIDING A PUBLIC GREENWAY AND PEDESTRIAN AND BICYCLE PATHWAY THROUGH HER PROPERTY ALONG FANNO CREEK

It is unfair and unjust for Mrs. Dolan to be singled out to bear the burden of completing the city's long-standing plans for greenways, storm drains, and pathways through her property. Mrs. Dolan is not responsible to provide parkland, storm drainage, and pedestrian and bicycle pathways for the people of the city. The city, implementing its policy with cavalier disregard for state-encouraged compensatory means in Goals 5 and 12, is confiscating the property it desires from individual riparian property owners along Fanno Creek through dedication mandates in land use development permits.

There is nothing exceptional about the Dolans' land use application. It represents the common stuff of day-to-day land use actions. It required no plan changes or zoning modifications. The subject parcel was not to be divided. The use, which is an approved use under the existing zoning, remains unchanged. The application requested only a building permit to replace an existing commercial building with a larger commercial building, fully within the boundaries of the existing parcel. The facts of Mrs. Dolan's case provide no justification for the

city to single her out to bear a particularly onerous burden, which in fairness should be borne by the public at large.

This Court has long recognized that the Fifth Amendment's Takings Clause is intended "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This Court also has recognized that, when government assesses landowners to provide public improvements, those assessments may be justified as being fair and just only if based on the special governmental benefits received by landowners, *Norwood v. Baker*, 172 U.S. 269, 279 (1898), and then only if a fair standard of apportionment of the costs is used. *Hancock v. City of Muskogee*, 250 U.S. 454, 458-459 (1919). Finally, this Court also has long recognized that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922).

If the city were to formally establish a new public park, or a new storm drain, or a new transportation corridor, on Mrs. Dolan's 1.67 acre private lot, there can be no question that it would have to condemn the riparian area of her property, and the 15 foot strip adjacent thereto, and pay her for the market value of that property so condemned. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984). Nothing in the facts of this case justifies the establishment of a park, storm drain, and transportation network by using permit conditions to avoid the city's



constitutionally-mandated obligation to condemn and pay for what it wants.

Even though the city's code specifically and directly requires dedication of the property, there is nothing in the city's Comprehensive Plan and Community Development Code that prevents the city from justly compensating affected landowners when the city applies that code provision, and, under the facts of the case, the Constitution mandates payment of just compensation. The underlying policy of the State of Oregon, manifested in Statewide land use Goal 5, empowered the city to use fee acquisition, developmental rights acquisition, and preferential assessment to compensate Mrs. Dolan for the greenway dedication. See App. A-5.<sup>5</sup>

In the instant case, the city is acting to fulfill a long-standing plan to establish a park network, storm drainage improvement system, and recreational pedestrian and bicyclist trail system. See Pet. App. J, pp. J-1, 2. Mrs. Dolan certainly could be assessed for her fair share of the costs of providing these public amenities. However, the

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<sup>5</sup> That State policy has been recognized by Chief Justice Rehnquist within the context of government protection of historic landmarks. In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), he noted that "many States and cities in the Nation have chosen to preserve . . . [the natural and aesthetic values of property] by purchasing or condemning restrictive easements . . . and are apparently quite satisfied with the results. See, e.g., Ore. Rev. Stat. §§ 271.710, 271.720 (1977) [replaced by ORS §§ 271.715 – 271.795 (1991) (local government may purchase conservation easement from willing landowner to protect natural, scenic or open space values of real property)]. . . ." 438 U.S. at 152 n.14 (Rehnquist, J., dissenting).

city has identified no special benefits conferred on Mrs. Dolan, and has not identified any specific quantifiable burdens created by Mrs. Dolan's new store that would justify imposing a burden on Mrs. Dolan that is not imposed on the public at large.<sup>6</sup>

The effective replacement of one retail sales building with another on Mrs. Dolan's property occurs entirely within the boundaries of her private property, J.A. at 3, and will not impair or destroy in any way any manner of use by the general public of Fanno Creek or the city's Main Street on which the property fronts.

Similarly, Mrs. Dolan benefits in no discernible way from the greenway and pedestrian and bicycle pathways. Even the city agreed that customers come to Mrs. Dolan's store to purchase bulky items rather than to browse for small, personally-transportable plumbing and electric supplies. Pet. App. G. p. G-31, 32. The effects of the dedications on Mrs. Dolan are all negative. She must relocate her new building on the site, incurring additional costs and loss of parking spaces during construction and prior to the demolition of the old building on the site, and

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<sup>6</sup> The city's findings are grossly inadequate when compared to those found by the Court of Appeals for the Ninth Circuit to satisfy the "essential nexus" of *Nollan*. In *Commercial Builders v. Sacramento*, 941 F.2d 872, 873 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992). The city's impact fee exaction ordinance, found to be constitutional, was supported by a detailed study by an outside consultant that identified the specific impacts generated by new developments in terms of numbers of new low-income workers and the government financial burden, in thousands of dollars, per worker. The exaction was set based on that exhaustive study.

then must sustain the costs of building the pathway. The public receives all the benefits of these dedications. Mrs. Dolan bears all the burdens.

In fact, the city separately imposed assessments on Mrs. Dolan that required her to pay her fair share of the costs of both transportation improvements and provisions for storm water runoff from the enlarged building. Pet. App. G, pp. G-13, 14. The property dedication was a bonus which the city extracted in addition to the assessments it imposed. Moreover, the city also imposed an additional requirement that Mrs. Dolan construct the pedestrian and bicyclist pathway on the property she was required to dedicate to the city. Pet. App. G, p. G-28.

The reconstruction of the store and the requirement for the dedications are independent acts. If the Dolans were to have never sought a building permit, the city would still have its requirement to complete its greenway and pathway system across Mrs. Dolan's land, and would have to have exercised its power of eminent domain to acquire the land. Since the Dolans did seek a building permit, however, Mrs. Dolan now must pay with her property, not because of any harmful thing she is doing or any beneficial thing she will receive, but because she has the misfortune to own land which the city determined "will be the backbone of [the city's] open space system." Pet. App. J, p. J-2. She is caught in the middle of the city's program to provide "a continuous pathway system intended to serve the public good." Pet. App. G, p. G-26.

The imposition of the dedications, which have no demonstrated relationship to any benefit received or burden created by Mrs. Dolan, violates basic principles of fairness. Her fair share of the cost of providing the general public with a greenway, expanded storm drain channel, and pedestrian and bicycle pathway, is no more than that of any other member of the public at large. In *Nollan*, this Court held, on facts analogous to the facts of the instant case, that a local government "is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' " but, if it wants to provide for public access over private property, "it must pay for it." 483 U.S. at 841-842. This Court should hold the city's dedication requirements in the instant case are patently unfair and unjust special assessments, and unconstitutional under the Fifth and Fourteenth Amendments.

## II

### THE CITY OF TIGARD FAILED TO ESTABLISH THE REQUIRED "ESSENTIAL NEXUS" OF A REASONABLY DIRECT AND PROPORTIONAL RELATIONSHIP BOTH IN CHARACTER AND DEGREE BETWEEN THE EFFECTS OF MRS. DOLAN'S PROPOSED STORE IMPROVEMENTS AND THE EXACTION OF 7000 SQUARE FEET OF HER PRIVATE PROPERTY

Mrs. Dolan asserted to the city that its dedication conditions were a taking because those dedications failed to substantially advance a legitimate state interest. Therefore, the city was required to find that the terms of the

dedications were reasonably proportional, in both character and degree, to the direct, quantifiable burdens on municipal services caused by the Dolans proposed store expansion.<sup>7</sup> The city made no such findings.

Dedications imposed as conditions to receiving a development permit can result in a regulatory taking in violation of the Fifth Amendment. *Nollan, supra*. The takings test applied in *Nollan* was whether the permit condition “‘substantially advance[s] legitimate state interests.’” *Id.*, 483 U.S. at 834 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (land use regulation does not effect a taking if it substantially advances a legitimate state interest and does not deny an owner economically viable use of her land)) (brackets in original). For a development permit to meet this test, there must be an “essential nexus” between the permit condition and the adverse impacts of the proposed development. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) (must have a “cause and effect relationship between the property use . . . and the social evil”).

This Court’s *Nollan* majority’s holding on the nexus requirement established there must be a “close fit” for the cause and effect relationship between development impacts and conditions of approval. This “close fit” was

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<sup>7</sup> In dissent, Oregon Supreme Court Justice Peterson concluded the city had the burden of showing the Dolans’ development created a need for the city’s exactions. He asserted the majority of the Oregon Supreme Court agreed the city had this burden. Pet. App. A, p. A-18 (Peterson, J., dissenting).

clearly delineated by Justice Scalia, responding to the dissent of Justice Brennan:<sup>8</sup>

Even if the [California Coastal] Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would suffice. We do not share JUSTICE BRENNAN’s confidence that the Commission “should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access,” post at 862, that will avoid the effect of today’s decision. We view the Fifth Amendment’s Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a “substantial advanc[ing]” of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction. . . .

*Nollan*, 483 U.S. at 840-841 (emphasis and brackets in original). Justice Scalia thus made it apparent that there must be a close, specific and direct link between means

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<sup>8</sup> In dissent, Justice Brennan had argued: “The Court’s insistence on a precise fit between the forms of burden and condition on each individual parcel along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate.” 483 U.S. at 847 (Brennan, J., dissenting) (emphasis added). He later characterized the *Nollan* Court’s opinion as an “unusual demand for a precise match between the condition imposed and the specific type of burden on access created by the appellants.” *Id.* at 849 (emphasis added).



and ends in order for dedications imposed on development to be constitutional.

Furthermore, this Court's decisions have long recognized that the Fifth Amendment requires the permit condition to be reasonably fashioned both in character and degree to be proportional to those burdens that the proposed use of the private property would impose on the public health, safety or welfare. See: *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (Takings Clause prevents public from imposing on single individual more than his just share of burdens); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (there is nothing to show that the withdrawal liability imposed on an employer will always be out of proportion to its experience with the pension plan). In the absence of a proportionate cause-and-effect relationship, or "essential nexus," the permit condition is not a legitimate regulatory action but a means of "extortion" which works a taking in violation of the Fifth Amendment. *Nollan*, 483 U.S. at 837.

*Nollan* articulates the basic premise that the right of use is an essential attribute of the ownership of property. Therefore, the approval by a local government of a land use permit does not bestow a government benefit on the permit applicant that would justify government demanding a *quid pro quo* for permit approval. Consistent with this principle, this Court ruled in *Nollan* that property dedications, which in other circumstances would constitute a taking, would be justified in the context of land use approvals only if the property dedication substantially advances the same legitimate state interest that could, in the alternative, justify denial of the permit altogether. The

Oregon court, and many other courts which have purported to apply the *Nollan* analysis<sup>9</sup>, have failed to recognize this essential principle on which the decision rests.

Demonstration of a substantial nexus between the dedication and the adverse effects of the proposed action is necessary to ensure that the actual conveyance of private property to the government is, under the circumstances of the specific case, a substitute for a regulatory restriction on the owner's right of use and not a disguised acquisition of property by government.

In this case, the city did not demonstrate the existence of the essential nexus required by *Nollan*. No attempt was made to establish that the unquantified effects asserted by the city to result from the enlarged building would justify denial of the permit in absence of the required dedication. It is clear that the effects of Mrs. Dolan's proposal on storm water runoff, transportation, and greenway facilities would not be different from any

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<sup>9</sup> See, e.g.: *Bernardsville Quarry v. Bernardsville Borough*, 608 A.2d 1377, 1383-1384 (N.J. 1992) (adverse impacts of development need only be reasonably determined on adequate evidence to be inimical to a legitimate government interest); *Pengilly v. Multnomah County*, 810 F. Supp. 1111, 1113 (D.Or. 1992) (*Nollan* does not require that individual proposed developments must be shown to have deleterious impact before dedication conditions can be imposed on them); *Commercial Builders* 941 F.2d at 874-875 (*Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question); *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991) (there must be substantial relationship between exactions and the stated government interest, not the development's impacts).



other similar development in the city. Indeed, Mrs. Dolan is required to pay the same assessments as other similar owners would to offset resulting burdens on transportation and storm water facilities. Pet. App. G, pp. G-13, 14. With payment of the special assessments, the record demonstrates no basis for denial of the applications. Therefore, there is no way to establish a nexus between the required property dedications and a legitimate state interest that could justify denial of the permit.

The record shows the circumstances in this case to be exactly what this Court sought to prevent in adopting the nexus requirement in *Nollan*. The only exceptional thing about Mrs. Dolan's proposal was its location on land the city wished to acquire for other established city programs. The dedication was imposed to avoid the cost of land acquisition for those other programs.

Since the required nexus must relate the property dedications to reasons justifying denial of the application, it is difficult on these facts to analyze the nexus standard in any more detail. No valid reasons justifying denial of the permit were set forth. The burdens on transportation and storm water facilities were offset by assessments. However, even if it is assumed that some residual burdens remain, the failure of the city to identify and quantify those burdens leaves no support for its claim that the required nexus exists.

By adopting a "reasonably related" relationship, the city ignored this Court's *Nollan* precedent that the "essential nexus" requires a "substantially related" connection – a direct and proportionate link – between the proposed

development and the adverse public impacts occasioned by that development. See Pet. App. A, pp. A-9 – 13.

The nexus used by the city is one which utterly fails to establish a substantial relationship between a proposed project and the adverse public impacts which a permit condition is designed to alleviate. Indeed, the nexus analysis conducted by the City of Tigard did not even attempt to establish that the Dolans' dedication of land and construction of the pathway was directly and proximately necessitated by the stormwater runoff and additional pedestrian and bicyclist traffic which their enlarged commercial facility would cause. All the city could find was the dedications were "reasonably related" to the stormwater runoff and pedestrian and bicyclist traffic that *would be expected* to be caused by the new facility.

In his dissent below, Justice Peterson of the Oregon Supreme Court made clear the city had made a decision that was not based on an "essential nexus."

From reading [the city's] order in this case, I am convinced Tigard decided that it needed a pedestrian/bicycle pathway and a flood control easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case.

The findings here do not establish any cognizable remediable purpose attributable to the [Dolans' proposed] change in use. The conditions relating to the pedestrian/bicycle pathway

and flood control and greenway easements are impermissible on the record made in this case.

Pet. App. A, pp. A-29, 30 (Peterson, J., dissenting).

The record also fails to disclose any cause and effect relationship. Even though the city's asserted relationship between the greenway exaction and the impact of the demolition and reconstruction of the petitioners' building is recited as being "reasonably related," the real underlying city purpose in requiring the petitioners to dedicate greenway land is: (1) To further the objectives of the city's *Master Drainage Plan*; and, (2) to provide for the physical relocation and expansion of the Fanno Creek channel to accommodate stormwater runoff from additional new development projected in the drainage basin. Pet. App. G, pp. G-38, 39.

There is no evidence in the record that the greenway property exacted from petitioners is even related to any hypothetical increase in stormwater runoff caused by demolishing a 9700 square foot structure, and replacing it with a 17,600 square foot structure. The city's requiring the dedication of petitioners' land, and the construction of a pedestrian/bicycle pathway, also bears no relationship to the impacts of their proposed development. There is no relationship between the impacts on public pedestrian and bicycle movement created by the demolition and reconstruction of the retail sales building, and the requirement that the Dolans dedicate their private property to the city for a pedestrian/bicycle pathway.

The city's justification for this dedication was merely a subterfuge. The findings of the city's planning commission, adopted by the city council in its decision, found the

dedications reasonably related to the development of the site, found it reasonable to assume and reasonable to expect the development would have anticipated transportation impacts, and concluded the dedications could offset some of those impacts. Pet. App. G, p. G-24. The city acted as it did because its code required it to, and not because it made, or could make, findings based on evidence of adverse impacts. The city's code required dedication of land for a greenway and pedestrian pathway without regard to any impacts, adverse or otherwise, of the development.

The "reasonable" "expectations" and "anticipations" in the city's findings were nothing more "than an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841. There was no essential nexus between the city's conditions and the impacts of the petitioners' proposed use. Disregarding *Nollan*, the city required dedication of land by Mrs. Dolan to help complete an already existing, and partially completed, greenway and pathway system by what Justice Scalia termed "an out-and-out plan of extortion." *Id.* at 837 (citations omitted).

The city's true purpose in requiring dedication of the petitioner's land for, and construction of, a pedestrian/bicycle pathway was to achieve general public benefit,<sup>10</sup> not to offset the current and future adverse effects of the demolition and reconstruction of the retail sales building.

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<sup>10</sup> The record makes clear that the pathway dedication and construction was intended to meet "the City's adopted policy of providing a continuous pathway system intended to serve the general public good." Pet. App. G, p. G-26.

The city's comprehensive plan required outright dedication regardless of impacts, or the lack thereof. Pet. App. G, p. G-25.

In sum, the decision of the city, requiring that Mrs. Dolan dedicate her land for a greenway and a pedestrian/bicycle pathway, and then construct that pathway, is nothing more than a manifestation of the clear intent to secure public improvements by forced dedications, and was made in spite of the city's failure to demonstrate any specific, proportionate relationship between the impacts of either stormwater runoff or pedestrian and bicycle use and demolishing and then replacing the petitioners' retail sales building.

In the instant case, Justice Peterson, dissenting from the Oregon Supreme Court's opinion, described the inadequacy of the city's findings, giving as an example the justification of the dedication for the greenway and storm drainage: "All these findings establish is that there will be some increase in the amount of storm water runoff from the site. A thimbleful? The constitution requires more than that." Pet. App. A, p. A-26 (Peterson, J., dissenting). If the city had, by a study, determined how much storm water entered Fanno Creek, and specifically how much more runoff would be caused by the Dolans' new store, it might have been able to constitutionally justify the dedication for the storm drain and greenway. It made no such study. If it had, by a study, determined the number of additional pedestrians, bicyclists, and automobiles the new store would generate, and how those numbers compared to the existing traffic loads on city streets, sidewalks, and bikepaths, it might have been able

to justify the pedestrian and bikepath dedication. It made no such study.<sup>11</sup>

In the absence of such detailed studies supporting specific city findings of direct impacts, the city has engaged in a creative and cost-free method of providing public recreation, storm drainage, and transportation improvements – demand the land for those improvements from development applicants.

In his dissent to the decision of the Oregon Supreme Court in *Dolan*, Justice Peterson argued for a close fit between development's adverse impacts and such exaction schemes: "I read the federal precedents to require a high threshold that the government must meet in showing the exaction is needed because of intensified land use by the landowner." Pet. App. A, p. A-29 (Peterson, J., dissenting). This Court made clear in *Nollan* that such a close fit was required. The city ignored that requirement and made an unconstitutional decision when it demanded 7000 square feet of Mrs. Dolan's private commercial property from her.

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<sup>11</sup> The city's conclusory findings "justify" the dedication of the land within the 100-year floodplain of Fanno Creek for a greenway on the basis of storm water runoff and increased flows in the creek, even though a principal purpose of the greenway was recreation. See Pet. App. J, pp. J-1,2. However, the city totally failed to justify how a new plumbing store was related to the dedication of greenway land for public recreation.



## III

THE OREGON SUPREME COURT DID NOT APPLY THE HEIGHTENED SCRUTINY MANDATED BY THIS COURT IN *NOLLAN* TO THE CLAIM OF MRS. DOLAN THAT THE REQUIRED DEDICATION OF 7000 SQUARE FEET OF HER PROPERTY VIOLATED THE TAKINGS CLAUSE

The Oregon Supreme Court, in upholding the constitutionality of the city's decision, and in rejecting Mrs. Dolan's claim the city's land use decision failed to substantially advance a legitimate state interest, did not apply the correct degree of judicial scrutiny to the city's purported "essential nexus." The level of scrutiny is the key factor in determining whether the Fifth Amendment's Takings Clause provides protection to property owners from government exaction schemes, such as that of the City of Tigard. The Oregon Supreme Court's use of a "reasonably related" level of review – virtually no scrutiny whatsoever – easily led to a decision upholding the dedication exaction even though the alleged nexus was only hypothetical and speculative. Any close reading of the record establishes that a cause and effect nexus never existed. See Argument II, *supra*.

In *Nollan*, this Court recognized that the imposition of dedications on development permits was one context in which closer judicial scrutiny of means-ends relationships was in order.<sup>12</sup> This closer look is particularly

<sup>12</sup> In *Nollan*, Justice Scalia noted "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as regulation of property is at issue the standards for takings challenges, due process challenges, and

important where government acts to take property ownership away from private citizens. Heightened scrutiny "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. Good*, 62 U.S.L.W. 4013, 4017 (U.S. Dec. 13, 1993) (footnote and citation omitted). See also *Harmelin v. Michigan*, 501 U.S. \_\_\_, 111 S. Ct. 2680, 2693 n.9 (1991) ("As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.") (citations omitted).

Mrs. Dolan urged the Oregon Supreme Court to apply heightened scrutiny to the city's decision imposing dedications on her: "The *Nollan* majority's holding on the nexus requirement establishes a heightened level of scrutiny for the cause and effect relationship between development impacts and conditions of approval." Petition for Review at 8, *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993) (reproduced in Pet. App. A). The Oregon Supreme Court declined to do so: "[W]e are unable to agree with petitioners [Mr. and Mrs. Dolan] that the

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equal protection challenges are identical . . . ." 483 U.S. at 835 n.3.

Professor Epstein amplifies this call for heightened judicial scrutiny when he writes: "Under the traditional rational basis test, that concern [with the state's ability to exact concessions from landowners] is so weak that state power (including the power to bargain) would remain unbridled. It is therefore no accident that Justice Scalia's implicit invocation of the doctrine followed a more general assertion that the deferential rational basis review does not carry over from equal protection to takings cases." Richard A. Epstein, *The Supreme Court – Forward*, 102 Harv. L. Rev. 4, 63 (1988).



*Nollan* court abandoned the reasonably related test." Pet. App. A, p. A-13 (footnote omitted).

Rejection of heightened scrutiny was fatal to Mrs. Dolan's taking claim. The scrutiny employed by the Oregon Supreme Court treats the city's action like a legislative enactment and would legitimize any and every land use decision of the city unless totally arbitrary or based on an invidious rationale. This "standard" is based on the presumption that the city acts properly. It provides no protection against even thinly disguised expropriation of property.

The Oregon Supreme Court failed to follow *Nollan* at every step of the analysis. The court gave no consideration to whether there exists any reason that could justify denial of the permit without the property dedications. The court simply accepted at face value the city's assertions that there would be some effect on transportation and storm water runoff. The fact that the city approves many applications that have similar effects and does not require property dedications was of no concern to the Oregon court.

The Oregon Supreme Court's consideration of the critical relationship between the dedication being required and the burdens imposed on the public by her proposed enlargement of her building was cursory at best. The court considered only whether some bare theoretical connection existed and never inquired, as required by the Fifth Amendment, into the closeness of that relationship either in terms of the character or degree of the burdens imposed. In particular, the court failed to consider the significance to Mrs. Dolan's taking claim that

the permit conditions she challenged exacted a fee simple absolute interest in 7000 square feet of her private land – almost ten percent of the total fee.<sup>13</sup> Only Justice Peterson, in dissent, saw that as significant: "If . . . the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely *why* the need in fact exists is a modest burden to place on the government." Pet. App. A, p. A-29 (emphasis in original) (Peterson, J., dissenting).

Under the "test" applied by the majority of the Oregon Supreme Court, the only relationship required to enable a city to exact full fee ownership of property is some possibility that the property might be used in a way that relates to any identifiable effect of the proposed use on the community. One or two additional customers at the enlarged store justifies taking total fee ownership of whatever land the city might apply to transportation purposes at the site. A "thimble full" of additional rain water runoff justifies taking full fee ownership of whatever property the city might use for drainage facilities at that site.

The level of "scrutiny" applied by the Oregon court provides no meaningful protection against the utilization of the police power to take private property without payment of just compensation. Virtually every land use

<sup>13</sup> In *Nollan*, the property interest unconstitutionally exacted was a public access easement. 483 U.S. at 828. In the instant case, the city is exacting the complete fee interest in 7000 square feet of land – a far more burdensome and significant infringement on constitutionally-protected property rights.

application will have many at least incidental effects on the community. Even the most elementary commercial use, a 15 square foot coffee kiosk,<sup>14</sup> for example, will reduce open space, increase refuse, increase storm water runoff, and create transportation demands. If it is "reasonable to assume," as the city did in this case, that such effects will result from almost any land use application, then any dedication of any legal interest covering any area of the property would survive judicial review if the city's staff is only marginally intelligent enough to state such assumptions and to claim that the city might be able to use the dedicated property to respond in some way to those effects on the community.

If the Oregon Supreme Court had applied heightened scrutiny, and, like the dissenting Justice Peterson, had made a discerning inquiry<sup>15</sup> into the city's articulated justification for requiring the dedication of the greenway and pedestrian and bicycle pathway, the court would have found the city's demand for dedication of Mrs.

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<sup>14</sup> The city's CDC identifies both "eating and drinking establishments" and "food and beverage" sales as a permitted use in the CBD zone. App. C-2 (CDC § 18.66.030.A.2). The CDC also subjects permitted uses that are new developments or major modifications to the site development review conditions that were applied to Mrs. Dolan's application. See Br. in Opp. App. B, p. B-1 (CDC § 18.120.020).

<sup>15</sup> Under heightened scrutiny, judicial review in Oregon of the legal sufficiency of city findings to satisfy this Court's "essential nexus" is a question of law, and is reviewed *de novo*. *State v. Herbert*, 302 Or. 237, 241, 759 P.2d 547 (1986).

Dolan's property did not substantially advance a legitimate state interest that could justify denial of the application.

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## CONCLUSION

The City of Tigard's comprehensive plan and land use regulations are intended to achieve completion of the city's greenway and pedestrian/bicycle pathways, parts of which have already been acquired by the city, by demanding land from persons proposing any kind of development near Fanno Creek. This is done in advance of any application – by virtue of city code requirements – and without regard to the impacts of that development. In fact, completing the city's park and transportation system is a responsibility of the city's residents as a whole. Riparian property owners who desire legitimate use of their lands – reasonable and beneficial uses which meet all standards for approval – should not be unfairly and unjustly singled out to finance the costs of providing public recreational and transportation facilities for the city's residents.

The city failed to find that its demand that Mrs. Dolan give up the fee interest in 7000 square feet of her land was reasonably proportional, in both character and degree, to the direct, quantifiable burdens on municipal services caused by the Dolans' proposed store expansion. This Court made clear in *Nollan* that such a close fit was required. The city ignored that requirement and made an unconstitutional decision when it demanded 7000 square

feet of Mrs. Dolan's private commercial property from her.

In upholding the city's scheme, the Oregon Supreme Court overlooked the very purpose of the Federal Constitution's takings clause. That purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan*, 483 U.S. at 835-836 n.4 (citation omitted). The decision of the court below completely ignores this purpose.

The precedent established by the Oregon Supreme Court licenses the unconstitutional activities of the city, operating under its comprehensive plan and land use regulations. That plan and those regulations were encouraged by the state to include compensatory measures and other provisions to avoid unduly infringing on the rights of aggrieved landowners. The City of Tigard chose to ignore those compensatory measures and take the cheap and easy route to secure the public benefits of a greenway, enhanced storm drainage, and pedestrian and bicyclist recreational facilities along Fanno Creek. The city decided to demand those benefits by unfairly and unjustly singling out riparian landowners to dedicate the necessary land, and construct the pathway, when they sought new or more productive use of their lands.

Petitioner respectfully urges this Court to reverse the decision of the Oregon Supreme Court, and hold that the City of Tigard violated the Fifth and Fourteenth Amendments to the U.S. Constitution when it required dedication of 7000 square feet of Mrs. Dolan's private property as a condition of site development approval for her new

plumbing and electrical supply store in downtown Tigard.

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Respectfully submitted,

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**APPENDIX A**

OAR 660-15-000 (5)

**5. OPEN SPACES, SCENIC AND HISTORIC AREAS,  
AND NATURAL RESOURCES**

**GOAL**

**To conserve open space and protect natural and scenic resources.**

Programs shall be provided that will

- (1) insure open space,
- (2) protect scenic and historic areas and natural resources for future generations, and
- (3) promote healthy and visually attractive environments in harmony with the natural landscape character. The location, quality and quantity of the following resources shall be inventoried:
  - a. Land needed or desirable for open space;
  - b. Mineral and aggregate resources;
  - c. Energy sources;
  - d. Fish and wildlife areas and habitats;
  - e. Ecologically and scientifically significant natural areas, including desert areas;
  - f. Outstanding scenic views and sites;
  - g. Water areas, wetlands, watersheds and ground-water resources;
  - h. Wilderness areas;
  - i. Historic areas, sites, structures and objects;
  - j. Cultural areas;



- k. Potential and approved Oregon recreation trails;
- l. Potential and approved federal wild and scenic waterways and state scenic waterways.

Where no conflicting uses for such resources have been identified, such resources shall be managed so as to preserve their original character. Where conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal.

**Cultural Area** – refers to an area characterized by evidence of an ethnic, religious or social group with distinctive traits, beliefs and social forms.

**Historic Areas** – are lands with sites, structures and objects that have local, regional, statewide or national historical significance.

**Natural Area** – includes land and water that has substantially retained its natural character and land and water that, although altered in character, is important as habitats for plant, animal or marine life, for the study of its natural historical, scientific or paleontological features, or for the appreciation of its natural features.

**Open Space** – consists of lands used for agricultural or forest uses, and any land area that would, if preserved and continued in its present use:

- (a) Conserve and enhance natural or scenic resources;
- (b) Protect air or streams or water supply;
- (c) Promote conservation of soils, wetlands, beaches or tidal marshes;
- (d) Conserve landscaped areas, such as public or private golf courses, that reduce air pollution

and enhance the value of abutting or neighboring property;

- (e) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space;
- (f) Enhance recreation opportunities;
- (g) Preserve historic sites;
- (h) Promote orderly urban development.

**Scenic Areas** – are lands that are valued for their aesthetic appearance.

**Wilderness Areas** – are areas where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. It is an area of undeveloped land retaining its primeval character and influence, without permanent improvement or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) ~~generally~~ appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) may also contain ecological, geological, or other features or scientific, educational, scenic, or historic value.

## GUIDELINES

### A. PLANNING

1. The need for open space in the planning area should be determined, and standards developed for the amount, distribution, and type of open space.
2. Criteria should be developed and utilized to determine what uses are consistent with open space values

and to evaluate the effect of converting open space lands to inconsistent uses. The maintenance and development of open space in urban areas should be encouraged.

3. Natural resources and required sites for the generation of energy (i.e. natural gas, oil, coal, hydro, geothermal, uranium, solar and others) should be conserved and protected; reservoir sites should be identified and protected against irreversible loss.
4. Plans providing for open space, scenic and historic areas and natural resources should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources.
5. The National Register of Historic Places and the recommendations of the State Advisory Committee on Historic Preservation should be utilized in designating historic sites.
6. In conjunction with the inventory of mineral and aggregate resources, sites for removal and processing of such resources should be identified and protected.
7. As a general rule, plans should prohibit outdoor advertising signs except in commercial or industrial zones. Plans should not provide for the reclassification of land for the purpose of accommodating an outdoor advertising sign. The term "outdoor advertising sign" has the meaning set forth in ORS 377.710(24).

## B. IMPLEMENTATION

1. Development should be planned and directed so as to conserve the needed amount of open space.

2. The conservation of both renewable and non-renewable natural resources and physical limitations of the land should be used as the basis for determining the quantity, quality, location, rate and type of growth in the planning area.
3. The efficient consumption of energy should be considered when utilizing natural resources.
4. Fish and wildlife areas and habitats should be protected and managed in accordance with the Oregon Wildlife Commission's fish and wildlife management plans.
5. Stream flow and water levels should be protected and managed at a level adequate for fish, wildlife, pollution abatement, recreation, aesthetics and agriculture.
6. Significant natural areas that are historically, ecologically or scientifically unique, outstanding or important, including those identified by the State Natural Area Preserves Advisory Committee, should be inventoried and evaluated. Plans should provide for the preservation of natural areas consistent with an inventory of scientific, educational, ecological, and recreational needs for significant natural areas.
7. Local, regional and state governments should be encouraged to investigate and utilize fee acquisition, easements, cluster developments, preferential assessment, development rights acquisition and similar techniques to implement this goal.
8. State and federal agencies should develop statewide natural resource, open space, scenic and historic area plans and provide technical assistance to local and regional agencies. State and federal plans should be reviewed and coordinated with local and regional plans.

9. Areas identified as having non-renewable mineral and aggregate resources should be planned for interim, transitional and "second use" utilization as well as for the primary use.
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## APPENDIX B

OAR 660-15-000 (12)

### 12. TRANSPORTATION

#### GOAL

To provide and encourage a safe, convenient and economic transportation system.

A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services; (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.

**Transportation** – refers to the movement of people and goods.

**Transportation Facility** – refers to any physical facility that moves or assists in the movement of people and goods excluding electricity, sewage and water.

**Transportation System** – refers to one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply



continuity of movement between modes, and within and between geographic and jurisdictional areas.

**Mass Transit** – refers to any form of passenger transportation which carries members of the public on a regular and continuing basis.

**Transportation Disadvantaged** – refers to those individuals who have difficulty in obtaining transportation because of their age, income, physical or mental disability.

## GUIDELINES

### A. PLANNING

1. All current area-wide transportation studies and plans should be revised in coordination with local and regional comprehensive plans and submitted to local and regional agencies for review and approval.
2. Transportation systems, to the fullest extent possible, should be planned to utilize existing facilities and rights-of-way within the state provided that such use is not inconsistent with the environmental, energy, land-use, economic or social policies of the state.
3. No major transportation facility should be planned or developed outside urban boundaries on Class I and II agricultural land, as defined by the U.S. Soil Conservation Service unless no feasible alternative exists.
4. Major transportation facilities should avoid dividing existing economic farm units and urban social units unless no feasible alternative exists.
5. Population densities and peak hour travel patterns of existing and planned developments should be considered in the choice of transportation modes for trips taken by persons. While high density developments with concentrated trip origins and destinations should be designed to be principally served by mass

transit, low-density developments with dispersed origins and destinations should be principally served by the auto.

6. Plans providing for a transportation system should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources.

### B. IMPLEMENTATION

1. The number and location of major transportation facilities should conform to applicable state or local land use plans and policies designed to direct urban expansion to areas identified as necessary and suitable for urban development. The planning and development of transportation facilities in rural areas should discourage urban growth while providing transportation service necessary to sustain rural and recreational uses in those areas so designated in the comprehensive plan.
2. Plans for new or for the improvement of major transportation facilities should identify the positive and negative impacts on: (1) local land use patterns, (2) environmental quality, (3) energy use and resources, (4) existing transportation systems and (5) fiscal resources in a manner sufficient to enable local governments to rationally consider the issues posed by the construction and operation of such facilities.
3. Lands adjacent to major mass transit stations, freeway interchanges, and other major air, land and water terminals should be managed and controlled so as to be consistent with and supportive of the land use and development patterns identified in the comprehensive plan of the jurisdiction within which the facilities are located.

4. Plans should provide for a detailed management program to assign respective implementation roles and responsibilities to those governmental bodies operation in the planning area and having interests in carrying out the goal.
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## APPENDIX C

TIGARD  
COMMUNITY DEVELOPMENT CODETITLE 18  
ZONING

. . . . .

Chapter 18.66CBD: CENTRAL BUSINESS DISTRICT

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18.66.030 Permitted Uses

## A. Permitted uses in the CBD district are as follows:

## 1. Civic use types:

- a. Public administrative agency;
- b. Community recreation;
- c. Cultural exhibits and library services;
- d. Lodges, fraternal, and civic assembly;
- e. Parking facilities;
- f. Postal services;
- g. Public safety services;
- h. Public support facilities; and
- i. Religious assembly;

## 2. Commercial use types:

- a. Amusement enterprises;
- b. Animal sales and services:
  - (i) Grooming; and

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- (ii) Veterinary, small animals;
  - c. Automotive and equipment:
    - (i) Cleaning; and
    - (ii) Repairing, light equipment;
  - d. Building maintenance services;
  - e. Business equipment sales and services;
  - f. Business support services;
  - g. Communication services;
  - h. Convenience sales and personal services;
  - i. Eating and drinking establishments;
  - j. Financial, insurance, and real estate services;
  - k. Food and beverage sales;
  - l. Medical and dental services;
  - m. Participation sports and recreation:
    - (i) Indoor; and
    - (ii) Outdoor;
  - n. Personal services, general;
  - o. Professional and administrative services;
  - p. Religious assembly;
  - q. Repair services, consumer;
  - r. Retail sales, general;
  - s. Transient lodging;
3. Residential Use Types (See R-40 and R-12 for development standards):

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- a. Single-family attached residential units;
  - b. Multiple-family residential units; and
  - c. Home occupations subject to provisions of Chapter 18.142.
  - d. The CBD zoning district allows for R-40 residential development except within the area south of Fanno Creek defined as follows:
  - e. All lands bounded by Fanno Creek, Hall Boulevard, Omara, Ash Avenue and Hill Street within the CBD shall be designated R-12 PD and shall be developed as planned developments in conformance with the R-12 district standards. (Ord. 89-06; Ord. 86-08; Ord. 84-73; Ord. 83-52)
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